

IN THE MATTER OF THE WORKERS'
COMPENSATION INSURANCE POLICY
ISSUED TO MSM TRUCKING INC.,
BY LIBERTY MUTUAL INSURANCE COMPANY
POLICY # WC 734 S509088-017
EFFECTIVE DATE 6/16/2007 TO 6/16/2008

HEARING NO. 09-HR-0603

Mr. Stanislaw Ragan
MSM Trucking, Inc.,
242 Nordic Rd.
Bloomington, IL 60108

Liberty Mutual Insurance Company
c/o Mr. Paul Holtrup
116110N. Meridian
Suite 500
Carmel, IN 46032

ORDER

I, Michael T. McRaith, Director of the Illinois Department of Insurance, hereby certify that I have read the Record in this matter and the hereto attached Findings of Fact, Conclusions of Law and Recommendations of the Hearing Officer, Louis Butler, appointed and designated pursuant to Section 402 of the Illinois Insurance Code (215 ILCS 5/402) to conduct a Hearing in the above-captioned matter. I have carefully considered and reviewed the Record of the Hearing and the Findings of Fact, Conclusions of Law and Recommendations of the Hearing Officer attached hereto and made apart hereof.

I, Michael T. McRaith, Director of the Illinois Department of Insurance, being duly advised in the premises, do hereby adopt the Findings of Fact, Conclusions of Law and Recommendations of the Hearing Officer as my own, and based upon said Findings, Conclusions and Recommendations enter the following Order under the authority granted to me by Article XXIV and Article XXXI of the Illinois Insurance Code (215 ILCS 5/401 et. seq. and 215 ILCS 5/500-5 et. seq.) and Article X of the Illinois Administrative Procedure Act(5 ILCS 100/10-5 et. seq.).

This Order is a Final Administrative Decision pursuant to the Illinois Administrative Procedure Act (5 ILCS 100/1-1 et seq.). Further, this Order is appealable pursuant to the Illinois Administrative Review Law (735 ILCS 5/3-101 et seq.). language

NOW IT IS THEREFORE ORDERED THAT:

- 1) The decision of Liberty, classifying MSM's driver, Mr. Lewkoicz, as an employee for policy # WC 734 S509088-017 from 6/16/2007 to 6/16/2008 in determining premiums owed is proper; and
- 2) Neither party be assessed for the cost of this proceeding.

DEPARTMENT OF INSURANCE of the
State of Illinois;

Date: 14 June 2010


Michael T. McRaith
Director

STATE OF ILLINOIS



Department of Insurance

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FINDINGS OF FACT, CONCLUSIONS OF LAW **AND RECOMMENDATIONS OF THE** **HEARING OFFICER**

Now comes Louis Butler, Hearing Officer in the above-captioned matter and offers his Findings of Fact, Conclusions of Law and Recommendations to the Illinois Director of Insurance.

FINDINGS OF FACT

- 1) On January 4, 2009, the Illinois Workers' Compensation Appeals Board (Board) addressed the matter of the workers' compensation insurance policy audit dispute, regarding policy # WC 734 S509088-017, between MSM Trucking (MSM) and Liberty Mutual (Liberty) (Exhibit # 2).
- 2) On January 21, 2009, the Illinois Department of Insurance (Department) received from Stanislaw Ragan, on behalf of MSM, a Request for a Hearing disputing the rate classification imposed upon MSM by Liberty (Hearing Officer Exhibit # 2).
- 3) On February 15, 2010, the Director issued an Authority to Conduct Hearing in the matter of workers' compensation insurance policy appointing Louis Butler as Hearing Officer in this proceeding (Hearing Officer Exhibit # 1).
- 4) On February 5, 2010, the Director issued a Notice of Hearing in this matter, pursuant to MSM's request, setting a Hearing date, time and location of March 11, 2010, at 10:00 a.m., at the Department's Offices in Chicago, Illinois (Hearing Officer Exhibit # 2).
- 5) The Notice of Hearing states, pursuant to 50 Ill. Adm. Code 2402.270, the Director may order that the costs of this proceeding be assessed against the parties (Hearing Officer Exhibit # 2).
- 6) The Hearing in this matter was convened on March 11, 2010 at approximately 10:05 a.m. at the Department's Offices in Chicago, Illinois at which time were present Louis Butler, Hearing Officer; Paul Holtrup, on behalf of Liberty; Stanislaw Ragan appearing pro se, on behalf of MSM; and Mariola Ragan, spouse of Stanislaw Ragan, was present as a Polish to English translator for her husband.
- 7) The purpose of this proceeding was to determine whether Liberty was correct in including Piotr Lewkowicz, a truck driver, as an employee of MSM when calculating MSM's policy premium.
- 8) Mr. Stanislaw Ragan testified in the narrative form, with the aid of a translator, as follows:
 - a. Mr. Ragan entered four MSM Trucking Exhibits into the record. Exhibit #1 is a lease agreement for a truck between MSM and Mr. Lewkowicz; Exhibit #2 is a copy of receipts which document lease payments from Mr. Lewkowicz to Mr. Ragan for the use of the truck; Exhibit #3 is a copy of a certificate of workers' compensation insurance that Mr. Lewkowicz presented to MSM; Exhibit #4 is a copy of the letter from Liberty informing MSM of the audit;

- b. Mr. Ragan testified to owning two trucks. He stated that he leased one truck to Mr. Lewkowicz and drove the other truck himself. Mr. Lewkowicz paid for leasing the truck that he drove and covered all the expenses associated with that truck including gas and insurance;
 - c. Mr. Ragan found jobs for Mr. Lewkowicz but Mr. Lewkowicz was also permitted to locate jobs on his own;
 - d. Mr. Lewkowicz leased the truck from Mr. Ragan between April 1, 2007 to December 20, 2007;
 - e. Mr. Lewkowicz had his own workers' compensation insurance policy but he was not covered under it. The Ragan's did not know by looking at Mr. Lewkowicz's policy that he was not covered under it.
- 9) On cross-examination, by Mr. Holtrup, Mr. Ragan testified as follows:
- a. MSM is a truck driving business. Mr. Ragan does construction type jobs such as hauling dirt, concrete, and stone. Mr. Ragan stated about Mr. Lewkowicz, "It was the garbage removing until that transfer, until which date? Between April 1, 2007 and like December 20, 2007. And then after that he started to do the same construction job;"
 - b. The lease with Mr. Lewkowicz ended December 20, 2007;
 - c. The truck that Mr. Lewkowicz drove was under the authority of MSM Trucking;¹
 - d. Mr. Ragan was the one who found garbage-hauling jobs for Mr. Lewkowicz;
 - e. When asked whether MSM billed for the hauling of the garbage, billed the customer, collected the money for the hauling of the garbage and then paid Mr. Lewkowicz, Mr. Ragan responded, "Yes;"
 - f. Mr. Ragan testified that after he paid Mr. Lewkowicz 100 percent of the revenue generated by the truck then Mr. Lewkowicz would pay \$400 per week as the price for leasing the truck. Mr. Ragan believes that he operated as a middleman for Mr. Lewkowicz in finding the jobs;

¹ The question that this response is based on was put forth by Mr. Holtrup and was based on his statement that in order for a truck to operate on the road authority must be granted from either the State of Illinois or the Federal Motor Carrier Safety Administration. In this case the authority to operate the truck driven by Mr. Lewkowicz was issued to MSM Trucking.

- g. Mr. Ragan agreed with the statement that all of the revenue generated by the truck driven by Mr. Lewkowicz was reported on MSM's tax returns;
 - h. MSM's name as well as the company's MC number was located on the side of the truck that was owned by Mr. Ragan and driven by Mr. Lewkowicz;
 - i. The lease agreement between MSM and Mr. Lewkowicz was terminable by either party at any time without penalty;
 - j. Mr. Ragan stated that since Mr. Lewkowicz was not the owner of the truck that Mr. Lewkowicz could not put his name on the truck or get a MC number;
 - k. Mr. Ragan stated that Mr. Lewkowicz could go find different jobs hauling but as long as he was driving a truck authorized to MSM he would still be operating a truck that was under the authority of MSM;
 - l. Mr. Lewkowicz was responsible for paying the expenses on the truck. MSM provided Mr. Lewkowicz with a gas card. Mr. Lewkowicz would give Mr. Ragan receipts then repay the gas money to Mr. Ragan;
 - m. When asked whether he [Mr. Ragan] filed any equipment leases with the Illinois Commerce Commission on behalf of Mr. Lewkowicz which, stated that Mr. Lewkowicz was leasing a truck from Mr. Ragan, Mr. Ragan responded that he did not file anything.
- 10) In response to questioning by the Hearing Officer, Mr. Ragan responded as follows:
- a. Mr. Lewkowicz parked the truck at TRM's lot (another trucking company that also rents spaces for parking). Mr. Ragan stated that Mr. Lewkowicz paid the parking cost. Mr. Ragan stated that everyone pays to park there;
 - b. Mr. Lewkowicz generally knew by the afternoon whether he had a job for the next day. If he did not have a job already lined up then he and Mr. Ragan would call the different companies trying to find jobs;
 - c. Mr. Ragan testified that Mr. Lewkowicz was contacted by the garbage company if they had work for him. They would call him directly the day before and tell him that he had a job for the next day;
 - d. MSM does not have uniforms;

- e. When looking for jobs, Mr. Ragan called dispatchers from different companies to see if they had work.
- 11) Mr. Holtrup testified on behalf of Liberty as follows:
- a. Mr. Holtrup entered three Liberty Exhibits into the record. Exhibit #1 is a copy of the policy that is the subject of this dispute which was issued to MSM by Liberty; Exhibit #2 is the workers' compensation audit; Exhibit #3 is a copy of a case, Roberson v. The Industrial Commission, which addresses employee/employer relationships;
 - b. Mr. Holtrup stated that the workers' compensation audit, which is dated July 22, 2008, predates the e-mail that was sent to MSM on September 5, 2008 (MSM Exhibit #4);
 - c. The front page of the audit states that Liberty determined that Mr. Lewkowicz was an employee of MSM and that while MSM did provide a certificate of liability insurance for Mr. Lewkowicz that as an employee of MSM he was included under the audit and the proper premium needed to be charged;
 - d. The e-mail contains information explaining why Liberty believed that Mr. Lewkowicz should be classified as an employee stating that MSM owned the truck and paid him. Mr. Holtrup stated that the audit indicated that MSM was paying the expenses and things of that nature [for the truck] but what was said at this hearing was different.
- 12) Amicus Court Reporters, Inc. recorded the testimony taken in this proceeding and charged the Department \$269.30 for the Court Reporter's attendance and a copy of the proceedings.

DISCUSSION AND ADDITIONAL FINDINGS

- 13) This matter comes to the Director of Insurance as an appeal by MSM Trucking, Inc. pursuant to Section 462 of the Illinois Insurance Code. Specifically, the dispute centers on Liberty Mutual Insurance Company's application of a workers' compensation rating system to the business activities of MSM. The rating classification and premium charge for the MSM's Workers' Compensation Insurance Policy # WC 734 S509088017, issued by Liberty, for policy period 6/16/2007 through 6/16/2008 was based on a correct determination by Liberty. Mr. Lewkowicz, who drove a truck belonging to MSM, was in fact properly classified as an employee of MSM.

Section 462 of the Illinois Insurance Code (215 ILCS 5/462) provides, in part:

“Every rating organization, and every company which does not adopt the rates of a rating organization, shall provide within this state reasonable means whereby any person aggrieved by the application of its rating system may be heard, in person or by his authorized representative, on his written request to review the manner in which such rating system has been applied in connection with the insurance afforded him. If the rating organization or company fails to grant or reject such request within thirty days after it is made, the applicant may proceed in the same manner as if his application had been rejected. Any party affected by the action of such rating organization or such company on such request may, within thirty days after written notice of such action, appeal to the Director, who, after a hearing held upon not less than ten days’ written notice to the appellant and to such rating organization or company, may affirm or reverse such action.”

The evidence presented in this matter indicates that MSM was issued a workers’ compensation policy by Liberty. The workers’ compensation policy provides the terms of coverage and party liabilities. The classification code given to MSM was 7228. This code is for Trucking: Local hauling only - all employees & drivers. During the policy period at issue Mr. Ragan owned two trucks that were used for hauling waste, concrete, and other construction type material. Mr. Ragan drove one truck and Mr. Lewkowicz drove the other truck. It is Mr. Ragan’s contention that Mr. Lewkowicz was not an employee but an independent contractor who leased the truck on a month-to-month basis.

During the audit, the auditor concluded that MSM was in fact the employer of Mr. Lewkowicz. As a result of the auditor’s determination, MSM was assessed a premium deficiency totaling \$26,114. The premium deficiency was based, in part, on the payroll of Mr. Lewkowicz during the policy period. MSM argued that Mr. Lewkowicz was an independent contractor who was free to take other jobs and who had his own workers’ compensation policy.

820 ILCS 305/1 (a)(2), (b)(2), and (3) provided, in pertinent part:

Workers’ Compensation Act.

(a) The term “employer” as used in this Act means:

*

*

*

2. Every person, firm, public or private corporation...who has any person in service or under any contract for hire, express or implied, oral or written, and who is engaged in

any of the enterprises or businesses enumerated in Section 3 of this Act...

* * *

(b) The term “employee” as used in this Act means:

2. Every person in the service of another under any contract of hire, express or implied, oral or written...

* * *

3. Any one engaging in any business or enterprise referred to in subsections 1 and 2 of Section 3 of this Act who undertakes to do any work enumerated therein, is liable to pay compensation to his own immediate employees in accordance with the provisions of this Act.

MSM’s testimony supports the conclusion that Mr. Lewkowicz was in fact an employee of MSM rather than an independent contractor. MSM’s belief that Mr. Lewkowicz was operating as an independent contractor simply because he had a lease agreement with MSM is not controlling. The Act states that an individual is characterized as an employer or employee either expressly or impliedly. Common law traditionally looks at several factors to determine whether an individual should be characterized as an employee. “In general, employment status is determined upon consideration of a number of factors, such as, “the right to control the manner in which the work is done, the method of payment, the right to discharge, the skill required in the work to be done, and who provides tools, materials, or equipment.” Luby v. Industrial Commission, 82 Ill.2d 353, 358 (1980).

MSM had the right to control the manner in which Mr. Lewkoicz conducted his work. During the policy period, Mr. Lewkoicz obtained his jobs from Mr. Ragan and Mr. Lewkoicz’s lease agreement could be terminated at anytime. It does not appear that Mr. Lewkoicz had any control over which jobs he accepted, how much each job charged, or the time and location of the jobs. Mr. Ragan owned both of the trucks, they were imprinted with his (MSM’s) company’s logo, and operated under the authority of MSM. Despite his testimony stating that Mr. Lewkoicz paid for all the maintenance, gas, and insurance on the vehicles no evidence was presented that would support such a finding. MSM issued to Mr. Lewkoicz a gas card. Mr. Ragan testified that Mr. Lewkoicz reimbursed MSM for the gas though no receipts substantiating this testimony were presented. Also, it appears that Mr. Lewkoicz only had access to the truck during the operating hours of MSM. Mr. Lewkoicz did not appear to have access to the truck at his own discretion. At the end of a day, the truck leased by Mr. Lewkoicz was parked in a lot where Mr. Ragan parked his other vehicle. MSM provided no evidence indicating that Mr. Lewkoicz ever used the truck to complete jobs for people other than customers obtained by or through Mr. Ragan.

There is no indication that Mr. Lewkoicz possessed a specialized skill in the area of driving a truck. He was not employed to handle one or two difficult assignments; he worked continuously and exclusively for MSM. In this respect, his skill could be characterized as ordinary. No evidence was presented that supports a conclusion that

MSM's ability to discharge Mr. Lewkoicz was in any way limited. MSM owned the truck Mr. Lewkoicz drove and he received his income from each load hauled.

At the hearing, Mr. Ragan claimed that Mr. Lewkoicz received 100 percent of the payment for each load he hauled and then only paid Mr. Ragan the amount for leasing the truck. However, MSM claimed 100 percent of these payments on their own tax returns. The auditor from Liberty, after examining check records, determined that Mr. Lewkoicz had been paid a total of \$19,462 and that there was no evidence that any deductions had been made. Other statements made to the auditor during the audit by Mr. Ragan indicate that MSM paid Mr. Lewkoicz about 30% of what each load made and did not take out taxes. Courts have held that the method of payment is given little weight. "Although the respondent withholds no income tax or social security, that factor has not been found significant." Id. at 359.

Based upon all of the evidence produced at the Hearing in this matter, the Hearing Officer finds that Mr. Lewkoicz was an employee of MSM and Liberty is entitled to charge additional premiums under the contract.

CONCLUSIONS OF LAW

Based upon the above stated Findings of Fact and the Record in this matter the Hearing Officer offers the following Conclusions of Law to the Director of Insurance.

- 1) Louis Butler was duly and properly appointed as Hearing Officer in this matter pursuant to Section 5/402 of the Illinois Insurance Code (215 ILCS 5/402).
- 2) The Director of Insurance has jurisdiction over the subject matter and the parties to this proceeding pursuant to Sections 401, 402, 403 and 462 of the Illinois Insurance Code (215 ILCS 5/401, 5/402, 5/403 and 5/462).
- 3) The Liberty's audit at policy end, pursuant to the contract of insurance between the parties, correctly categorized the MSM's driver as an employee.
- 4) The Liberty properly charged the MSM premiums based on the payroll of MSM's driver.

RECOMMENDATIONS


Based upon the above stated Findings of Fact, Conclusions of Law and the entire Record in this matter the Hearing Officer offers the following Recommendations to the Director of Insurance.

- 1) That the determination that premiums are due to Liberty and calculated based on the payroll of the driver Mr. Lewkowicz is correct; and

- 2) That the costs of this proceeding, consisting solely of the fees charged to the Department of Insurance by Amicus Court Reporters, be waived.

Respectfully submitted,

Date: May 20, 2010

A handwritten signature in cursive script, appearing to read "Louis Butler", written over a horizontal line.

Louis Butler
Hearing Officer